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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 749

WILLIAM JOHN MCCARTHY AND JAMES ROCCO MIRAGLIA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 21–24) is reported at 297 F. 2d 183.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1961. A petition for rehearing was denied on January 29, 1962. The petition for a writ of certiorari was filed on February 26, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court could properly find that petitioner McCarthy's palm print, introduced into

evidence at trial for comparison with a print lifted from the surface of an automobile involved in the crime, was voluntarily given to federal officers.

STATEMENT

An indictment returned on August 10, 1960, in the United States District Court for the Northern District of Illinois charged petitioners with the robbery of $5,000 belonging to a federally-insured loan association, taken by force and violence from the person of one Rudolph Churan, the association president, in violation of 18 U.S.C. 2113. After a trial before the court, each of the petitioners was found guilty and sentenced to imprisonment for a term of two years (A. 1).[1] The court of appeals affirmed.

The government's evidence consisted primarily of the testimony of Churan and fingerprint evidence introduced by an expert examiner. Churan testified that, on September 18, 1959, while transporting association funds in his automobile, he was forced to a stop and robbed by two men in another automobile (A. 2–3). Churan identified the petitioners as the robbers (Tr. 21–22). The expert witness established that palm prints lifted from surfaces of the two automobiles matched those of the petitioners (A. 25).

Petitioner McCarthy moved to suppress the card bearing his palm print that was used by the expert for comparison, on the ground that the print had been taken from him in violation of his constitu-

[1] Record references "A" are to the certified copy of the appellants' appendix in the court below. "Tr." refers to the transcript of trial testimony which has also been certified to this Court.

tional rights (A. 14). After hearing evidence on the motion, the court overruled it (A. 24). The evidence pertinent to the motion to suppress was as follows:

F.B.I. agent Shanahan, who had investigated the robbery, testified that after attempting to get in touch with petitioner McCarthy for several months he had found him at home on June 15, 1960 (A. 13). Shanahan stated that McCarthy's father-in-law was present but not within earshot of the ensuing conversation and that he did not recall anyone else's being present (A. 13, 16). The agent testified that McCarthy refused to talk about the robbery and that, when he asked McCarthy "if he would care to accompany me down to the office" for photographing and fingerprinting, McCarthy declined, saying "he wasn't going to help me put him in jail" (A. 13). Shanahan testified that he told McCarthy (*ibid.*) that

> it wasn't much of a problem to get pictures and fingerprints of him inasmuch as the violation [that Shanahan was investigating] * * * was also a local violation, and that in all probability, the Chicago Police Department was equally interested in him and they could pick him up, in which case, if they did, and fingerprinted and photographed him, I would have those made available to me through the normal course of business.[2]

[2] Shanahan testified that he was at that time unaware of any arrest process or charge outstanding against McCarthy (A. 17), but that he knew (although there is no testimony that he told McCarthy) that the city robbery detail was also investigating the robbery (A. 16).

The agent testified that he made no threat to force or induce McCarthy to go with him to F.B.I. headquarters (A. 22), and he denied having told McCarthy that he would have him picked up by the police if he refused to go with him (A. 17, 22). Agent Shanahan testified that McCarthy then accompanied him to the F.B.I. office in the agent's car (A. 14, 22); McCarthy was under no restraint on the way to the office (A. 22). After McCarthy's fingerprints, palm prints and a photograph were taken, he was driven back to his residence (A. 14, 22).

Petitioner McCarthy, his wife, his father-in-law and his mother-in-law all testified in varying but substantially similar terms that they were in the apartment during the conversation and that agent Shanahan had told McCarthy that if McCarthy did not accompany him to F.B.I. headquarters the agent would have the local police pick him up.[3] Petitioner McCarthy testified that the agent did not have a warrant for his arrest. He also testified that, in the course of the conversation, he asked Shanahan whether he was

[3] According to the wife, Shanahan said, "If you don't come with me, I will have the police come and take you and you know what that means * * *" (A. 20). According to the father-in-law, Shanahan said, "Well, if I come back with the officers you can stay in jail overnight. You are better off to go now" (A. 20). According to the mother-in-law, Shanahan said, "Well if you don't, then I will have to have the police come here and get you" (R. 19). According to petitioner McCarthy, Shanahan told him that "I could go with him or he said he would have the bureau pinch me, the detective bureau"; he said the agent promised him that "[i]f I went with them * * * I would come home right away" (A. 21).

under arrest and Shanahan replied that he was not (A. 21). McCarthy testified that he was not mistreated while he was at F.B.I. headquarters (A. 22).

ARGUMENT

The petitioner McCarthy renews in this Court his contention, rejected by both courts below, that the card bearing his palm print should have been suppressed at trial as having been secured in violation of his rights under the Fourth and Fifth Amendments. The sole issue presented by that contention is whether the district court, on the basis of the evidence before it, could properly find that this petitioner voluntarily and intelligently assented to having his palm print taken by the F.B.I.

The total facts and circumstances here amply support such a finding. The record in no way suggests an atmosphere of physical or moral compulsion. The conversation in question took place at petitioner McCarthy's home. There was no pretense about the agent's purpose in being there; he wished to talk with McCarthy about the crime he was investigating, and McCarthy refused to talk about it, as was his privilege. There is no suggestion that the agent was anything but courteous. There was at least one member of McCarthy's family on the premises at the time; according to the defense witnesses, several of them were in the room during the conversation. It is undisputed that petitioner was invited—not ordered—to accompany the agent to his office for the sole purpose of taking photographs and fingerprints, that he went under no physical restraint whatever, and that he was

immediately returned to his home thereafter. It is likewise undisputed that petitioner, whose testimony indicates that he was not completely unfamiliar with law enforcement procedures (A. 21–22), knew that he was not under arrest and that he did not have to accompany the agent.

The only disputed issue of fact is whether the federal agent told petitioner McCarthy that, unless he went to the F.B.I. office to be photographed and fingerprinted, the agent would have the local police pick him up. As the court below held, the credibility of the witnesses was for the district court to determine (Pet. 23), see *United States* v. *Ziemer*, 291 F. 2d 108 (C.A. 7). The court was entitled to disbelieve the testimony of petitioner McCarthy and his close relatives and to prefer the testimony of the agent that he made no threat but merely reminded petitioner of an obvious fact: that fingerprints on file with local authorities would be available to federal officers.

Moreover, even if petitioner McCarthy's version of events were believed, it would hardly support an inference of coercion under the circumstances here. It appears that McCarthy's only reason for regarding the agent's alleged statement as a "threat" was that, if he were picked up by the Chicago police, he would have to remain overnight, while the F.B.I. would not hold him at all (A. 21). Thus "threatened" with the possibility of detention by the Chicago police, he chose not to take his chances on his ability to contest the legality of such an arrest, but to remain free by cooperating with federal officers. This is not a situation where a finding of consent to being

fingerprinted would "not in accordance with human experience." See *Nelson* v. *United States*, 208 F. 2d 505, 509 (C.A.D.C.), certiorari denied, 346 U.S. 827, and cases cited therein. There was no mere passive or submissive acquiescence, suspect as having been given in response to an unceremonious demand under color of law to enter and search private living quarters. See *Johnson* v. *United States*, 333 U.S. 10. There was no invasion of petitioner's body without his knowledge or consent, such as might plausibly give rise to objection under normal circumstances. Cf. *Breithaupt* v. *Abram*, 352 U.S. 432, 435–36. This was a conscious election by an apparently sophisticated person to take positive action in cooperating with federal officers in routine matters of identification.

There is no valid basis for petitioner Miraglia's contention that, if petitioner McCarthy's palm print was introduced into evidence illegally, the conviction against Miraglia is "tainted" (Pet. 19). Petitioners have suggested no way in which this evidence against McCarthy affected Miraglia, simply because they were tried together. The fingerprints that were used to identify Miraglia at trial were obtained only after an F.B.I. arrest whose validity has not been contested (A. 15–16).[4] Moreover, as the court below found

[4] Agent Shanahan testified that he had asked Miraglia to come to F.B.I. headquarters to be photographed and fingerprinted, but Miraglia had refused to do so (A. 13). Shanahan said he was later informed by the city police that Miraglia had come in to them and voluntarily given his prints (A. 23). The agent testified that he had received copies of these prints from city police a few weeks later (A. 18). It does not appear that these prints were ever used for identification.

(Pet. 24), petitioner Miraglia did not voice this objection at trial. He cannot do so for the first time on appeal.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1962.